

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY REYNOLDS,

Defendant-Appellant.

UNPUBLISHED

July 7, 1998

No. 202546

Dickinson Circuit Court

LC No. 96-002016 FH

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced defendant to five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I. Factual Background

The jury convicted defendant of CSC III based on his non-forcible sexual intercourse with the then-fifteen-year-old victim. While defendant was only charged and convicted of one count of CSC III, it was essentially undisputed that he and the victim had sexual intercourse more than once. Defendant asserted that the victim told him that she was seventeen-years-old.

II. Effective Assistance

Defendant claims that he received ineffective assistance of counsel below. To obtain reversal of a conviction based on ineffective assistance, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Defendant argues that his trial counsel provided ineffective assistance in seeking withdrawal of defendant's guilty plea after the trial court found that the plea agreement had been breached. Under the

plea agreement, defendant pleaded guilty to one count of CSC III and the prosecutor agreed to remain silent at sentencing. At the sentencing hearing, however, the prosecutor challenged the trial court's scoring of the sentencing guidelines and the trial court determined that this was a breach of the plea agreement. The trial court indicated that it would have sentenced defendant to two and one-half to fifteen years' imprisonment. Defendant then met with counsel, who subsequently brought a motion for withdrawal of the plea. The trial court granted this motion. Defendant argues that he was prejudiced by this action because he received a longer minimum sentence after trial than he would have received if the plea agreement had been enforced.

Due to the lack of an evidentiary hearing at which trial counsel's actions might have been explained, we limit our review of the issue to mistakes of counsel apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The record indicates that trial counsel was aware that defendant's options were to withdraw the plea or seek specific performance of the plea. The record does not establish that trial counsel failed to advise defendant of these options. The decision whether to enter a guilty plea is the defendant's decision, and trial counsel is not required to make a recommendation. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Because we must attribute the decision to withdraw the plea to defendant personally, we cannot consider this decision to be an unprofessional error by trial counsel. Thus, defendant has not established that he received ineffective assistance of counsel in connection with the withdrawal of his guilty plea. *Pickens, supra*.

Defendant also argues that his counsel proffered a legally invalid "mistake of age" defense and that this constituted ineffective assistance of counsel. The CSC III statute, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), prohibits a person from engaging in sexual penetration with another person who "is at least 13 years of age and under 16 years of age." It is true that a "reasonable mistake of age defense" is not available to this crime. *People v Lardie*, 452 Mich 231, 255, n 40; 551 NW2d 656 (1996); *People v Cash*, 419 Mich 230, 240-246; 351 NW2d 822 (1984). However, based on the evidence of defendant's admission to a police detective that he engaged in sexual intercourse with the victim and the victim's testimony that defendant did so and in light of the indisputable fact that the victim was fifteen-years-old at the pertinent time, there is no reasonable probability that any other defense strategy would have resulted in acquittal. Thus, we will not reverse defendant's conviction based on ineffective assistance of counsel due to his trial counsel advancing a legally invalid "mistake of age" defense. *Pickens, supra*.¹

III. Sentencing Proportionality

Defendant challenges his sentence as being disproportionate to the crime charged. This Court reviews sentencing issues for an abuse of discretion to ensure that the sentence imposed is proportionate to the seriousness of the crime, the nature of the crime and the circumstances surrounding the defendant's criminal behavior. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). Defendant presents nothing on appeal sufficient to establish unusual circumstances that rebut the

presumption of proportionality to which sentences within the sentencing guidelines are entitled. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Affirmed.

/s/ Stephen J. Markman

/s/ Richard Allen Griffin

/s/ William C. Whitbeck

¹ We note that the trial strategy of the defense counsel amounted to an appeal for jury nullification. “Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.” *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). While trial counsel did not explicitly ask the jurors to exercise this power, she effectively did so by arguing as a defense that the victim had lied about her age to defendant. While a jury has the power to exercise jury nullification, it does not have the right to do so. *Id.* at 207; see also *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997) (jury’s power of leniency “is a de facto power with regard to which the jury is not instructed”). Accordingly, “[a] trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime.” *Demers, supra* at 207.